No. 07-618

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In the
Supreme Court of the United States

GOSS INTERNATIONAL CORP.,

Petitioner,

v.

TOKYO KIKAI SEISAKUSHO, LTD. and TKS (USA), INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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TKS' opposition rests on a fallacy—an asserted distinction between "relitigation" of a final federal court judgment, which TKS concedes may be enjoined to protect the judgment, and a clawback action that entirely nullifies a final judgment, which TKS contends may not be enjoined. Astoundingly, TKS maintains that because the Japanese court considering its clawback claim "has no authority to reconsider the issues decided by" the federal court "or to conclude that TKS did not violate" the 1916 Act, but instead is empowered to completely nullify the federal court's final judgment by ordering Goss to repay the judgment in full and all TKS' litigation expenses, the United States judgment has "no relevance to the action in Japan" and does not warrant protection. (Opp. 11, 23.) To state that argument is to refute it. TKS' clawback action—brought under a foreign statute that declares Goss' judgment "invalid" (Pet. 4)—is the most direct assault on the judgment imaginable and will "effectively nullify" it (App. 25a). The suggestion that federal courts may enjoin litigants from revisiting the findings underlying their final judgments, but may not enjoin those litigants from entirely nullifying the same judgments, makes no sense. Neither the other circuits nor this Court have so held; it is not even what the Eighth Circuit held here. In fact, TKS cites *no* authority supporting its extraordinary proposition.

The basis of the Eighth Circuit's decision was that federal courts lack jurisdiction to protect a money judgment once the judgment has been satisfied. (App. 22a.) That holding directly conflicts with the Second Circuit's recent ruling in *Karaha* that federal courts

have continuing jurisdiction to protect a judgment "even after a judgment has been satisfied." (Pet. 16-19.) It also directly conflicts with this Court's teachings that federal courts should act to prevent parties from nullifying final judgments. (*Id.* 32-35; Profs' *Am.* Br. 17-20.) And, it leaves the analysis of comity in antisuit injunction cases in utter disarray. (Pet. 19-25.)

The federal courts' ability to enjoin parties from undermining final judgments is critical to our economy and the integrity of the federal judiciary. As the *amici* explain, and TKS does not dispute, numerous foreign nations have passed clawback statutes to nullify aspects of U.S. law with which they disagree, including treble damage awards under the antitrust laws. The Eighth Circuit's decision permits nationals from such countries to come to the United States to do business and earn profit, yet avoid any consequences for violating the laws enacted to protect U.S. markets.

1. A clawback action is the most extreme form of "relitigation" and the plainest example of undermining a final judgment. Based upon TKS' misconduct within the United States, Goss won a final federal judgment after trial, appeal, and a denial of certiorari. TKS' clawback action seeks to entirely nullify that judgment by requiring Goss to return all its proceeds and TKS' expenses to TKS, the losing defendant in the U.S. suit. Whatever term one uses to describe a clawback action, it is *more* destructive to federal judicial authority than a case where a foreign court fails to respect a judgment as *res judicata*. Under the Special Measures Law, Goss will not even have a chance to retry the factual issues on which it previously prevailed in the domestic action.

The Special Measures Law on its face contradicts TKS' assertions that its clawback action "acknowledge[s] the validity of [the] domestic judgment" and does not seek to relitigate "the validity of the U.S. judgment." (Opp. 18, 22 n.5.) The clawback statute declares that the final U.S. judgment "shall be invalid."[1] (Pet. 4.) The Eighth Circuit bluntly acknowledged that TKS' clawback action would "effectively nullify the remedy Goss legitimately procured in the United States courts." (App. 25a.) Unquestionably, TKS' pending action—which names Goss as a primary defendant under a clawback law that applies to *both* the U.S. plaintiff and its Japanese subsidiaries (*cf.* Opp. 3, 6, 11)—seeks to entirely undo the final judgment addressing TKS' violations of a U.S. statute. (Pet. 3-4.) If relitigation of the issues underlying a final judgment is impermissible, *a fortiori* direct nullification of a final judgment through collateral proceedings is not permitted.

2. TKS' baseless distinction between relitigation and nullification of a U.S. judgment flies in the face of this Court's recognition that an antisuit injunction is proper when the later action could deprive parties of "the substantial fruits of a judgment rendered in their favor." *Dietzsch*, 103 U.S. at 497. Rather than

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[1] In TKS' appeal of the underlying judgment–part of which TKS presented to this Court in 2005 (*see* No. 05-358)–the Eighth Circuit considered an attack on the validity of the U.S. judgment in light of the WTO's finding that the 1916 Act violated U.S. obligations under the WTO Agreements and Congress' prospective repeal of the Act. (*E.g.*, App. 102a-103a n.5.) TKS lost this challenge. Thus, even under TKS' excessively narrow understanding of "relitigation," TKS quite literally seeks to relitigate in Japan the validity of the final U.S. judgment.

becoming caught up in labels, courts consider whether a later lawsuit may undermine or nullify the result of the earlier action. *E.g.*, *International Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*, 441 F. Supp. 2d 552, 561-62 (S.D.N.Y. 2006) (defendants enjoined from pursuing "their legal rights in Brazil" even though the Brazilian suit would "resolve different questions" because it would "achieve the very same status" that the U.S. court had denied), *aff'd*, 246 F. App'x 73, 80 (2d Cir. 2007). This inquiry looks past verbal characterizations to protect the substance of a judgment "no matter how or when [a party] may attempt to evade it or escape its effect." *Dietzsch*, 103 U.S. at 497.

The cases TKS cites do not suggest that courts permit nullification. In *Silva Run Worldwide Ltd. v. Gaming Lottery Corp.*, 53 F. App'x 597, 598 (2d Cir. 2002), for example, the Second Circuit held that even if "*res judicata* does not preclude suit in Canada because [the defendant's] claims there were never actually litigated in the district court," an injunction was nonetheless appropriate because a federal court has the "power to enforce its judgments and to prevent the harassment of the prevailing party, whether in the form of vexatious litigation or otherwise." Thus, the Second Circuit upheld the district court's injunction against the defendant's attempt abroad "to discount, delay, avenge or otherwise frustrate the judgment." *Id.*; *see Laker Airways*, 731 F.2d at 927 ("The equitable circumstances surrounding each request for an [antisuit] injunction must be carefully examined to determine whether . . . the injunction is required to prevent an irreparable miscarriage of justice.").

TKS acknowledges that lower courts use various terminologies in examining whether the later action will undermine or nullify the prior judgment, including whether the actions are "dispositive" of each other, involve "the same liability," or adjudicate "mirror image claims." (Opp. 15.) Here, Goss' final judgment and TKS' clawback action are entirely dispositive of each other and would resolve the same liability. TKS concedes that the only element it must show to win its clawback action in Japan is that it paid the final U.S. judgment to Goss. (*Id.* 6.) Because TKS' clawback action will entirely undermine the U.S. judgment, it is a direct attack on that judgment and should be enjoined.

3. The Eighth Circuit's holding squarely conflicts with the Second Circuit's subsequent ruling in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 129 (2d Cir. 2007), certiorari petition pending, No. 07-619. The Eighth Circuit held that federal courts lack jurisdiction after satisfaction of a judgment. (App. 21a-22a.) In contrast, the Second Circuit held that "federal courts have continuing jurisdiction" to protect a judgment "even after a judgment has been satisfied." 500 F.3d at 129. The Eighth Circuit held that once the judgment was "rendered, paid, and satisfied," neither "the All Writs Act nor the court's ancillary enforcement jurisdiction provides the district court with a separate source of jurisdiction to enjoin TKS." (App. 22a.) In contrast, the Second Circuit held that jurisdiction to protect a satisfied judgment continues, "regardless of whether . . . the font of jurisdiction for such an injunc-

tion is characterized as 'ancillary' or otherwise." 500 F.3d at 129.

Underlining this clash, the Eighth Circuit explained that its jurisdictional analysis *would have been different if the judgment had not been satisfied*: "Given the status of the case at the time the injunction issued, the district court maintained ancillary enforcement jurisdiction to preserve the judgment.... However, the jurisdictional circumstances and comity considerations have changed because there is no longer an outstanding judgment to protect." (App. 28a; *see also id.* 26a.) Quoting this passage, TKS simply omits the language attributing the loss of jurisdiction to the change of circumstances caused by TKS' payment of Goss' judgment. (Opp. 8.) As we previously explained (Pet. 17-19), the Eighth and Second Circuits reached these conflicting holdings based upon their differing interpretations of the same precedent of this Court.

Not only are the legal principles applied in this case and *Karaha* flatly at odds, but the facts in *Karaha* are similar to those here. After losing a final judgment in the United States, the defendant in *Karaha* asked the Cayman Islands court to nullify the final U.S. judgment on the theory that it was a product of fraud "such as to vitiate" the underlying arbitration award. 500 F.3d at 117. The defendant there sought return of all damages, including "any sums received or to be received by [the plaintiff] pursuant to any order of the United States District Court . . . enforcing the [arbitration award]." *Id.* (quotation omitted). Similarly, TKS has asked the Japanese court to nullify a final U.S. judgment on the theory that it is contrary to Japan's view of international law articulated in the

Special Measures Law. (Opp. 18.) TKS seeks return of the damages awarded in the United States plus TKS' litigation expenses in the matter. (*Id.* 11.) The two lower court decisions cannot co-exist; either federal courts have jurisdiction to protect their final satisfied judgments from being nullified, or they do not.

4. This Court has consistently held that allowing a subsequent non-federal action to nullify a final federal judgment "would be contrary to the plainest principles of reason and justice." *French v. Hay*, 89 U.S. 250, 253 (1874); *Dietzsch*, 103 U.S. at 497; *see Dugas*, 300 U.S. at 428. As the *amici* law professors explain, the only potential distinction between this Court's *French* and *Deitzsch* decisions and the Eighth Circuit's decision here is that the attack on the final judgment in this case arises in a foreign court. (Profs' *Am.* Br. 17-20.) A federal court's jurisdiction to enjoin a party from prosecution of a foreign action to nullify a final federal judgment is no less than its jurisdiction to enjoin a domestic state court action.

This Court's decisions also refute TKS' suggestion that the federal courts' jurisdiction to prevent their final judgments from being undermined is restricted to situations in which an attempt is made to raise precisely the "same issues" resolved in the prior action. For example, in *Dugas*, this Court approved an antisuit injunction to prevent Dugas from pursuing a state court action on an appellate bond, which an insurance company posted to guaranty the company would "diligently prosecute its appeal" in the state court. 300 U.S. at 417-18. The company violated the guaranty, abandoning its appeal in favor of a federal interpleader that named Dugas. After the final

interpleader judgment, Dugas sought to collect on the company's state court bond. *Id.* at 420. Although Dugas did not directly seek to upset the final interpleader judgment, and although his state court action solely sought to remedy violations of the state appellate bond, this Court held that federal jurisdiction to enjoin the state suit was "free from doubt" because the state suit would have "contravened the fair intendment" of the federal interpleader. *Id.* at 420, 428. Here, too, TKS' clawback action for return of the damages awarded under the final U.S. judgment contravenes the fair intendment of that final judgment.

5. TKS incorrectly suggests that the final judgment here does not deserve the courts' protection because Congress repealed the underlying statute. To the contrary, Congress was well aware of the judgment in this case (then pending on appeal) and Japan's claims that the WTO Agreements required the 1916 Act to be repealed retroactively. H.R. Rep. 108-415 (2004). Yet Congress determined that the repeal should be prospective and that the WTO Agreements did not require retroactive repeal. *Id.*; 149 Cong. Rec. S7137-01 (May 23, 2003). It carefully crafted the repeal to leave Goss' judgment intact, *despite* Japan's demands to the contrary.[2] The issue now is not the wisdom of the statute enforced by the federal court, but the

[2] The WTO's view is irrelevant to this case both because it cannot trump U.S. law and because Congress has spoken on the matter. In any event, the WTO never addressed whether the WTO Agreements require the United States to retroactively comply with the finding that the 1916 Act was inconsistent with U.S. treaty obligations, nor did it approve the Special Measures Law.

integrity of a final judgment that Congress expressly preserved in the face of Japan's objections.

6. The Eighth Circuit also joined sides in the existing circuit split concerning the role of comity in issuing foreign antisuit injunctions. (App. 11a) (adopting "the conservative approach in determining whether a foreign antisuit injunction should issue"). Comity requires *mutual* respect between nations. *See Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Far from encouraging mutual respect, clawback actions are universally condemned as antithetical to international comity. *See* Lowenfeld, 75 AM. J. INT'L LAW at 637 (clawbacks are "deplorable measure[s]" that go "beyond the pale" and represent "a step backward [] as a matter of international law."); *accord* Danaher, 12 LAW & POL'Y INT'L BUS. at 961 (clawback laws are an "unprecedented offense" against comity and international law). TKS' clawback action is itself an attack on comity and accordingly is undeserving of protection. *See Laker Airways*, 731 F.2d at 939 ("The appellants' claims of comity now asserted in the United States courts come burdened with the failure of the British to recognize comity."). As the Eighth Circuit recognized, the Special Measures Law "like other clawback or blocking provisions, can be regarded as an affront to the laws and judicial rules of the United States." (App. 26a.)

Moreover, comity does not override the jurisdiction of a court addressing matters of domestic concern. *Hartford Fire Ins. v. California*, 509 U.S. 764, 798-799 (1993); *Hilton*, 159 U.S. at 163-64. And, comity has greatly reduced importance where a court acts to protect its final judgment. *See Paramedics*, 369 F.3d

at 655; *Allendale Mut.*, 10 F.3d at 433; *Laker Airways*, 731 F.2d at 928 n.53; *SG Avipro Fin. Ltd. v. Cameroon Airlines*, No. 05 Civ. 655, 2005 WL 1353955, at *2 (S.D.N.Y. June 8, 2005).

7. The Eighth Circuit's decision allows foreign nationals doing business in the United States to use foreign clawback statutes to effectively erase final U.S. judgments, including judgments under our antitrust laws. As the *amici* explain, the Eighth Circuit's holding—that federal courts are powerless to protect satisfied money judgments from foreign clawback actions—has broad application and will undermine the enforcement of U.S. law. The holding leaves no way to distinguish a treble damage suit for dumping from treble damage suits for monopolization, predatory pricing, or price fixing.

Numerous foreign countries have passed clawback actions aimed at nullifying unique aspects of U.S. law with which they disagree. Under the Eighth Circuit's decision, foreign nationals may intentionally violate U.S. antitrust law, on U.S. soil, knowing that if they are found liable they may invoke a clawback statute to nullify the judgment—to use TKS' words—"to correct an unjust result." (Opp. 23.) Giving foreign companies this "free pass" to escape the consequences of violating U.S. law would be highly damaging to the U.S. economy as well as to federal judicial authority.

8. This case is an appropriate vehicle for resolving the circuit split concerning the federal courts' jurisdiction to protect final satisfied judgments. Unlike the Second Circuit's *Karaha* decision, the decision below conflicts with controlling Supreme Court case law. The Second Circuit, by contrast, correctly applied

governing precedent. Furthermore, the Second Circuit's decision arises in the unusual context in which a foreign arbitral award was confirmed in a U.S. court and the antisuit injunction was sought to protect that confirmation. The petition here, by contrast, presents the frequently occurring and important question of whether a federal court's own judgment, giving effect to federal law governing the U.S. economy, may be protected through an antisuit injunction. Finally, this case presents the purest form of a direct attack on a final judgment and, thus, cannot become mired in questions about whether the later action will in fact undermine a final judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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